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Supreme Court of the United States

STAR ATHLETICA, L.L.C.,

Petitioner,

v.

VARSITY BRANDS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF FASHION LAW INSTITUTE *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. COPYRIGHT CURRENTLY OFFERS INCOMPLETE BUT CRUCIAL PROTECTION FOR BOTH EMERGING AND ESTABLISHED FASHION DESIGNERS 6

A. Fashion is an Industry Essential to the U.S. Economy and American Culture 7

B. The Rise of the American Fashion Industry to Global Prominence Parallels the Application of Intellectual Property Protection to Some Elements of Creative Design 11

C. Protection for Creative Fashion Designs Under U.S. Intellectual Property Law Still Lags Behind Other Prominent International Fashion Capitals, Harming Emerging and Established Designers 16

D. Conceptual Separability in Copyright, and the Partial Protection It Provides Designers, is Critical to the Fashion Industry 19

II. FASHION IS AN INFORMATION-BEARING GOOD INCORPORATING EXPRESSION PROTECTABLE VIA THE CONCEPTUAL SEPARABILITY STANDARD 21

A. The Existing Tests of Conceptual Separability Protect Expressive Elements of Fashion Design but Should Be Rationalized as a Standard Rather than an Additional Rule. 22

B. The Definition of a "Useful Article" under the Copyright Act Includes Exceptions Related to Appearance and Information that Together Establish the Copyrightability of Expressive Elements of Fashion Designs 25

C. This Court Should Adopt a Conceptual Separability Standard Not Only Consistent with the 6th Circuit's Result But Also With Long-Established Protection for Certain Elements of Fashion Designs 33

CONCLUSION 36

TABLE OF AUTHORITIES

Cases

Chosun Int'l, Inc. v. Chrisha Creations, Ltd.,
413 F.3d 324 (2d Cir. 2005) 14

Eve of Milady v. Impression Bridal, Inc.,
957 F. Supp. 484 (S.D.N.Y. 1997) 14

Folio Impressions, Inc. v. Byer California,
937 F.2d 759 (2d Cir. 1991) 14

Galiano v. Harrah's Operating Co.,
416 F.3d 411 (5th Cir. 2005) 25

Kieselstein-Cord v. Accessories by Pearl, Inc.,
632 F.2d 989 (2d Cir. 1980) 14, 19

Mazer v. Stein,
347 U.S. 201 (1954) ..... *passim*

On Davis v. The Gap, Inc.,
246 F.3d 152 (2d Cir. 2001) 19, 20

Peter Pan Fabrics, Inc. v.
Brenda Fabrics, Inc.,
169 F. Supp. 142 (S.D.N.Y. 1959) 14

Trifari, Krussman & Fishel, Inc. v.
Charel Co.,
134 F. Supp. 551 (S.D.N.Y. 1955) 19

Statutes and Other Authorities

U.S. Const. art. I, § 8, cl. 8 4

17 U.S.C. § 101 ..... *passim*

35 U.S.C. § 101 26

A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 109th Cong. 11-12 (2006) 3, 17

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Britt Aboutaleb, *Chanel Will Not Make its Pamela Love-Like Crystal Cuffs*, ELLE (Mar. 13, 2012) 20

Bureau of Labor Statistics, U.S. Dep't Of Labor, Occupational Outlook Handbook: Fashion Designers (2014-2015 ed.) 16

Charles James, *Clover Leaf* (1953) 30

Claude E. Shannon & Warren Weaver, THE MATHEMATICAL THEORY OF COMMUNICATION (Univ. of Illinois Press 1949) 24

Danica Lo, *Hannah Bernhard Says Iris Apfel Ripped Off Her Toucan Pin Design*, RACKED (May 18, 2011) 20

Diane von Furstenberg, *Fashion Deserves Copyright Protection*, L.A. TIMES, Aug. 24, 2007 16

Gucci, Look 14, Fall/Winter 2016 31

H.R. Rep. No. 94–1476 (1976) 6, 13

Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. on Intellectual Prop., Competition, and the Internet of the H. Comm. on the Judiciary, 112th Cong. 7 (2011) 17

Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71 (2014) 32

Jeremy Scott, Look 54, Spring 2017 30

Karen Van Godtsenhoven *et al.*, FASHION GAME CHANGERS: REINVENTING THE 20TH-CENTURY SILHOUETTE (2016) 30

Karen Yossman, *Comic-Con Makes a Fashion Statement*, THE NEW YORK TIMES (July 22, 2016) 10

Laird Borrelli-Persson, *A First Look at the Met's "Manus x Machina" Catalog*, VOGUE (Apr. 6, 2016) 10

Laura C. Marshall, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTELL. PROP. L. 305 (2007) 16

Matthew Sag, *Predicting Fair Use*, 73 Ohio St. L.J. 47 (2012) 24

"Mondrian" cheerleader apparel designed by Katie Graham in *Toyota –Car Launch*, BRAZEN HUSSY (April 27, 2010) 27

Narciso Rodriguez and Susan Scafidi, *Knock it off! Quashing design pirates*, THE CHICAGO TRIBUNE (Aug. 29, 2010) 3

Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537 (2009) 24

Piet Mondrian, Composition with Large Red Plane, Yellow, Black, Gray, and Blue (1921) 27

Rei Kawakubo for Comme des Garçons, Spring 2017 30

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

Susan Scafidi and Narciso Rodriguez, *Fashion Designers Need Strong Legal Protection for Their Clothing*, THE NEW YORK TIMES (October 22, 2015) 3

Susan Scafidi, *F.I.T.: Fashion as Information Technology*, 59 SYRACUSE L. REV. 69 (2008) 3, 6, 24, 29

Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115 (Peter K. Yu ed., 2006) 3, 6, 13, 15

The City's Big NY Fashion Boost, COUNCIL OF FASHION DESIGNERS OF AM. (Dec. 2, 2015) 8

The Economic Impact of the Fashion Industry, Joint Econ. Comm., U.S. Cong. (Sep. 6, 2016) 8, 9

Thom Browne, Look 1, Spring 2017 32

Wearables Market to Be Worth $25 Billion by 2019, CCS INSIGHT 10

Yves Saint Laurent, "Mondrian" day dress, The Metropolitan Museum of Art..... 27

INTEREST OF *AMICI CURIAE*[1]

Amici include the Fashion Law Institute joined by the following scholars, educators, award-winning fashion designers, industry executives, and business owners, all of whom have played a leading role in the fashion industry's efforts to address issues relating to intellectual property protection over the past decade and beyond:

Jeffrey Banks
Fashion Designer and Author

Maria Cornejo and Marysia Woroniecka
Creative Director / Founder and President, respectively
Zero + Maria Cornejo

Nathalie Doucet
Founder, Arts of Fashion Foundation

Keanan Duffty
Fashion Designer

Barry Kieselstein-Cord
Artist, Designer, and Photographer

Melissa Joy Manning
Jewelry Designer

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no persons other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Professor Susan Scafidi, Founder & Academic Director of the Fashion Law Institute, a nonprofit organization based at Fordham Law School, served as an expert witness for Respondents (then Plaintiffs) earlier in this case but did not and does not serve as counsel for a party.

Jack McCollough and Lazaro Hernandez
Creative Directors and Founders
Proenza Schouler

Narciso Rodriguez
Fashion Designer

Professor Susan Scafidi
Founder and Academic Director
Fashion Law Institute at Fordham[2]

The Fashion Law Institute, a nonprofit organization and the world's first academic center dedicated to the law and business of fashion, was founded with the assistance of the Council of Fashion Designers of America and its then-president and current board chairman, Diane von Furstenberg, and is headquartered at Fordham Law School. Fashion law itself emerged as a distinct legal field through the work of Professor Susan Scafidi, one of the *amici* joining this brief in her personal capacity. Professor Scafidi's research and engagement with the industry is also the primary source (with and without attribution) of leading arguments in favor of design protection, such as the need to protect emerging designers, the distortive effects of partial protection, the historical role of self-help, the problematic privileging of mimetic over transformational design, the cultural factors shaping limits on copyright protection, and

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[2] The Fashion Law Institute's affiliation with Fordham Law School is noted for information purposes only and does not necessarily reflect the point of view of the law school or the university.

the significance of statutory reform narrowly tailored to the industry.[3]

Amici Jeffrey Banks, Lazaro Hernandez, Narciso Rodriguez, and Professor Scafidi have testified in Congress on the issue of intellectual property and fashion design,[4] and fellow *amici* have shared their expertise and experience though

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[3] *See, e.g.*, Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115 (Peter K. Yu ed., 2006)(available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1309735). [hereinafter Scafidi, *Intellectual Property and Fashion Design*]; *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 79 (2006) (statement of Professor Susan Scafidi)[hereinafter, Scafidi, Judiciary Committee statement]; Susan Scafidi, *F.I.T.: Fashion as Information Technology*, 59 SYRACUSE L. REV. 69 (2008) [hereinafter Scafidi, *Fashion as Information Technology*].

[4] *See, e.g., A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 11-12 (2006) (statement of Jeffrey Banks, Fashion Designer, Council of Fashion Designers of America); *see generally* Narciso Rodriguez and Susan Scafidi, *Knock it off! Quashing design pirates*, THE CHICAGO TRIBUNE (Aug. 29, 2010), http://articles.chicagotribune.com/2010-08-29/opinion/ct-perspec-0829-fashion-20100829_1_design-maria-pinto-fashion; Susan Scafidi and Narciso Rodriguez, *Fashion Designers Need Strong Legal Protection for Their Clothing*, THE NEW YORK TIMES (October 22, 2015), http://www.nytimes.com/roomfordebate/2014/09/07/who-owns-fashion/fashion-designers-need-strong-legal-protection-for-their-clothing.

extensive public education efforts, intra-industry discussion with established and emerging designers, and related engagement with the Copyright Office, members of Congress on both sides of the aisle, and many others. In addition, various amici have designed and participated in educational programming for both students and professionals.

We are extremely familiar on both a theoretical and a practical basis with the relationship between copyright and fashion designs under U.S. law, and our immediate concern is that the present case not upset over half a century of legal precedents relied upon by the fashion industry – including a well-known case won by *amicus* Barry Kieselstein-Cord – and diminish the already limited patchwork of intellectual property protection available to fashion designers.

SUMMARY OF ARGUMENT

Fashion is an information-bearing good, and the Copyright Act has long served "To promote the progress of...useful Arts" by protecting at least some of the original aesthetic and informational expressions that designers embody in their work. U.S. Const. art. I, §8, cl.8. We believe that the Court should affirm the result reached by the Sixth Circuit with regard to the copyrightability of Respondents' designs, a result that is consistent with all of the various tests for conceptual separability identified by the panel below. The Court, however, should also clarify that separability is a flexible statutory standard that is best left unconstrained by maladaptive bright-line

rules or disparate treatment for fashion designs within the category of useful articles incorporating protectable expression.

The justifications for this approach are both prudential and doctrinal. Since the Court issued its landmark ruling in *Mazer v. Stein* over sixty years ago, 347 U.S. 201 (1954), the Copyright Office and a series of influential precedents have established the copyrightability of physically and conceptually separable expressive design elements embodied in fabric prints, bridal lace, jewelry, belt buckles, costumes, and other forms of fashion design. In light of the limited scope of copyright protection traditionally recognized for fashion designs under U.S. law, the fashion industry has come to rely on this longstanding protection for separable elements of expressive design.

This reliance by the fashion industry is consistent with the language and the logic of the Copyright Act itself. As the Court recognized long ago in *Mazer* and Congress confirmed in subsequent copyright reform, the Copyright Act is designed to encompass original expressive content regardless of the medium on which it is inscribed or the quality of its appearance or message. For protectable content embodied in useful articles, Congress enacted an adaptive standard that is intentionally open to context-sensitive judicial reasoning. The two-dimensional surface designs on articles of clothing worn by cheerleaders that are at issue in this case qualify for copyright protection under the statutory standard for separability, as do

countless other expressive design elements in fashion and other information-bearing goods.

ARGUMENT

I. COPYRIGHT CURRENTLY OFFERS INCOMPLETE BUT CRUCIAL PROTECTION FOR BOTH EMERGING AND ESTABLISHED FASHION DESIGNERS

While the question presented in this case concerns the general copyright standard for protecting the separable elements of useful articles, the immediate subject of the dispute — fashion — is one that has long received disparate treatment within copyright law.[5] The district court's discursion into "cheerleading-uniform-ness"[6] in this cases exemplifies the law's tendency to see what the legislative history of the Copyright Act tellingly refers to as "ladies' dress"[7] in a different light, unsuitable for the protections afforded other original works.

Nevertheless, despite the all-too-common mischaracterization of fashion as a sector of the economy wholly outside copyright, the fashion industry itself has an extensive history of using the limited patchwork of available protection to become

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[5] *See, e.g.*, Scafidi, *Intellectual Property and Fashion Design*; Scafidi, *Fashion as Information Technology*.

[6] *Varsity Brands, Inc. v. Star Athletica, LLC*, No. 10-2508, 2014 WL 819422, at *1 (W.D. Tenn. Mar. 1, 2014), vacated and remanded, 799 F.3d 468 (6th Cir. 2015), cert. granted in part sub nom. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 136 S. Ct. 1823, 194 L. Ed. 2d 829 (2016).

[7] H.R.Rep. No. 94–1476, at 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5668

a global leader in design. This section examines how U.S. fashion, from emerging designers to established brands, has come to rely on separability as an integral part of its strategy for continued growth.

A. Fashion is an Industry Essential to the U.S. Economy and American Culture

Over the past century, the fashion industry in the United States has undergone a major transition. What was once a provincial backwater known primarily for sweatshop manufacturing and knockoffs of European designs is now an economic powerhouse fueled by original creative works, and as the Respondent in this case illustrates, the industry's scope extends far beyond high-priced luxury couture. Sportswear, footwear, accessories, jewelry, denim, athletic apparel, swimwear, lingerie, bridal, even textiles themselves — the democratization of style in American culture in large part reflects the emergence of a multi-sector fashion business in which design is a primary driving force.

The evolution of the fashion industry in New York City provides a striking case in point. The city's early-to-mid-twentieth-century profusion of garment factories and stores hawking the latest copies of Parisian styles has given way to a new fashion economy: manufacturing accounts for only a little over eight percent of 98 billion dollars in total annual revenue, and the city is now home to hundreds of brands with their own original designs and signature styles. The twice-yearly New York Fashion Week alone has a local economic impact of

upwards of 900 million dollars a year and includes over 500 shows, from recent design-school graduates and emerging designers from local fashion incubators to iconic small and medium-size enterprises to multi-billion-dollar companies.[8] Design education is another major presence; besides being the home of several leading design schools, including Parsons, Fashion Institute of Technology, and Pratt Institute, the city also has its own High School of Fashion Industries, a specialized public school were students study fashion design and create their own works.[9]

New York, of course, is not the only city where fashion is having a substantial economic and social impact. A recent Congressional study noted that as of 2015 the nation's fashion industry was approaching $400 billion in annual sales, with localized fashion hubs extending beyond New York and Los Angeles to such cities as San Francisco, Columbus, Nashville, and Kansas City Fashion design education has also taken root nationwide, with more than 200 postsecondary schools offering fashion programs.[10]

Along with democratizing style across socioeconomic classes and creating opportunities for

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[8] *See The City's Big NY Fashion Boost*, COUNCIL OF FASHION DESIGNERS OF AM. (Dec. 2, 2015), https://cfda.com/news/the-citys-big-ny-fashion-boost.

[9] *See* The Economic Impact of the Fashion Industry, Joint Econ. Comm., U.S. Cong. (Sep. 6, 2016), http://www.jec.senate.gov/public/_cache/files/66dba6df-e3bd-42b4-a795-436d194ef08a/fashion---september-2016-final-090716.pdf.

[10] *See id.*

achievement among native-born U.S. citizens and immigrants alike, the fashion industry serves as a cultural influencer in other ways. For example, presenting a racially diverse runway has become an integral part of maintaining brand integrity; transgender and disabled models are featured in shows and advertisements; and in the mere three years since the Fashion Law Institute garnered international media attention for producing the first plus-size fashion show held in the tents at New York Fashion Week, size diversity at fashion shows is becoming routine.

Reports estimating the size of the global fashion industry at approximately $1.75 trillion annually[11] and describing its cultural influence are, if anything, under-representative of its full reach. The scheduled date of the Court's oral argument calls to mind two related and rapidly expanding sectors outside the realm of traditional fashion: Halloween costumes, which have become a multi-billion-dollar industry in the U.S.,[12] and geek fashion. In the space of less than a decade, the mimetic amateur cosplay prominent in the fan culture of comics and science fiction has given rise to an emerging geek fashion industry, including designers who transform licensed pop-culture intellectual properties into original and often subtle designs suitable for everyday office and even courtroom. This summer's Comic-Con International,

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[11] *See id.*

[12] *See* Halloween Headquarters, Nat'l Retail Fed'n, https://nrf.com/resources/consumer-data/halloween-headquarters.

in San Diego, an annual event attended by over 150,000 people, showcased geek fashion and such innovative creations as the first wearable Lego dress.[13]

3D-printed threeASFOUR dress, Spring 2016, as displayed in the Metropolitan Museum of Art's "Manus x Machina" exhibit.[14]

The emerging wearable technology sector, projected to reach $25 billion by the end of 2019,[15] and new production technologies like 3D-printing are pushing the boundaries of both form and

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[13] *See* Karen Yossman, *Comic-Con Makes a Fashion Statement*, THE NEW YORK TIMES (July 22, 2016), http://www.nytimes.com/2016/07/22/fashion/comic-con-makes-fashion-her-universe.html.

[14] *See* Laird Borrelli-Persson, *A First Look at the Met's "Manus x Machina" Catalog*, VOGUE (Apr. 6, 2016), http://www.vogue.com/13423848/manus-x-machina-costume-institute-chanel/.

[15] *See Wearables Market to Be Worth $25 Billion by 2019*, CCS INSIGHT, http://www.ccsinsight.com/press/company-news/2332-wearables-market-to-be-worth-25-billion-by-2019-reveals-ccs-insight.

function in fashion design. These innovations are expanding the ability of designers to create not only on the surface of the body but also in the space around the body, as well as to experiment with new informational and communicative functions within the realm of fashion. Among the many expressions of wearable tech is the smart denim collaboration between Google and Levi's, named "Project Jacquard" after the revolutionary Jacquard loom and its punch-card programming system for the production of textile patterns, an invention that helped launch both the industrial revolution and the modern digital age.

B. The Rise of the American Fashion Industry to Global Prominence Parallels the Application of Intellectual Property Protection to Some Elements of Creative Design

Although protection for fashion designs under U.S. law is limited, one factor contributing to the American fashion industry's emergence as a global leader was the judicial recognition of copyright protection for certain elements of creative design starting in the 1950s. Together with changes such as the opportunity created for U.S. designers by the shuttering of Parisian fashion houses during World War II, post-war American affluence, advances in technology that expanded manufacturers' ability to produce sophisticated designs at lower costs, and the growth of a diverse textile and apparel sector including more ready-to-wear fashions, the extension of copyright protection to fabric prints and jewelry supported the expansion of a domestic

design industry. To some extent the U.S. followed a pattern evident in other countries with recognized global fashion capitals. Just as the fashion industries in Paris, London, and Milan developed in tandem with design protection, the position of original designers in the U.S. fashion industry benefitted from the long-desired, albeit circumscribed, establishment of legal means for protecting at least some elements of their work.

As is the case for most forms of intellectual property protection, the origins of legal protection of fashion are European and intended to support economically and culturally important creators and creative industries. The historical roots of copyright protection for the protection of creative design elements in the useful arts extend back to the beginning of the modern fashion industry in France, when, in the early 18th century, an ordinance in Lyons prohibited merchants and manufacturers from pirating the designs created by the city's innovative silk weavers. Protection was subsequently extended throughout the entire country, and England, its commercial rival, followed suit with the enactment of legal protections for its own textile industry. The scope of European fashion design protection continued to expand with the rise of haute couture fashion houses in the 19th century. Along with the utilization of legal means of protecting their work, designers also combatted fashion piracy through self-help methods such as trade association standards and new technology, including Madeleine

Vionnet's integration of her identifying thumbprint into her label.[16]

From a textile copyright perspective the United States was essentially a pirate nation until the mid-twentieth century, when the Supreme Court's holding in *Mazer v. Stein* established that the artistic elements of manufactured works are eligible for design protection.[17] As the Court expressly noted, patent and copyright protection were not mutually exclusive in regard to the same design,[18] and as the Brief for Respondents in this case discusses in more detail, the Copyright Office subsequently recognized copyright protection for fabric designs.[19] In doing so the Copyright Office set forth the standard that, through its incorporation into the Copyright Act of 1976, is at the heart of the issue presented in this case, namely, that "if the shape of a utility article incorporates features, such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existing independently as a work of art," these separable elements are eligible for copyright protection.[20]

Although the House Report for the 1976 Act dismissed extending the scope of this protection to the shape of "ladies' dress"[21] — a late Mad-Men-era

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[16] *See* Scafidi, *Intellectual Property and Fashion Design*, 116-117, 124.

[17] *Mazer v. Stein*, 347 U.S. 201 (1954).

[18] *See id.* at 217.

[19] *See* Respondent's Br. 28.

[20] *See* 17 U.S.C. § 101.

[21] H.R.Rep. No. 94–1476, supra note 8 at 55.

synecdoche for bodily covering regardless of gender — the fashion industry successfully relied on the fundamental principles of physical and conceptual separability to persuade courts to recognize copyright protection for certain aspects of fashion design, including textile patterns,[22] bridal lace designs,[23] jewelry and artistic accessories,[24] and separable elements of masks and costumes.[25] Many designers and fashion houses have also sought to secure protection by registering eligible designs. The Copyright Office regularly engages in conceptual separability analysis and has issued tens of thousands of registrations related to textiles and fashion; in 2014 alone, textile designers sought copyright registration of over 4,700 works described as textiles, fabric prints, or fabric designs.[26]

In addition, the fashion industry has integrated other available modes of legal protection into its overall design strategy. Trademark and trade dress have been prominent features of countless designs for several decades, particularly among well-known brands, at times skewing the creative process away

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[22] *See, e.g., Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 1991); *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F Supp. 142 (S.D.N.Y. 1959).

[23] *See, e.g., Eve of Milady v. Impression Bridal, Inc.*, 957 F. Supp. 484 (S.D.N.Y. 1997).

[24] *See, e.g., Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980). The successful plaintiff in this landmark case, Barry Kieselstein-Cord, is a signatory to this brief.

[25] *See, e.g., Chosun Int'l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2d Cir. 2005).

[26] Based on a search of the public catalog of the U.S. Copyright Office, available at http://copyright.gov.

from more original work and slowing the progress of design evolution in a bid to ward off piracy. Design and utility patents have also become a part of many companies' defensive arsenal, although, as in the *Mazer* era, patent protection remains inadequate for many designs and designers due to its expense, lengthy prior review process, procedural complexity, and high novelty standard.[27]

As *amici* can personally attest, the legal protection available to designers and fashion houses – for all its gaps and imperfections – is a significant part of business models and design strategies throughout the industry, and the recognition of the applicability of copyright to separable design features for over half a century has been particularly useful. Redefining this right such that copyright would not extend even to an easily identifiable two-dimensional design capable of existing in wide range of media would have a decidedly negative impact on the fashion community, which has come to rely on whatever predictable protection it can find.

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[27] *See Mazer*, *supra* note 20, at 216; *see also* Scafidi, *Intellectual Property and Fashion Design*, *supra* note 2, at 122. Although patent law can play a role in the protection of fashion, the requirements of novelty, utility, and nonobviousness along with the amount of time required to obtain a patent and the expense of prosecuting one make this form of protection impractical if not impossible.

C. Protection for Creative Fashion Designs Under U.S. Intellectual Property Law Still Lags Behind Other Prominent International Fashion Capitals, Harming Emerging and Established Designers

Efforts by designers and brands to protect their designs reflect the significant investment of time and money in creative work. Far from being an endless cycle of repeated tropes, fashion advances through innovation, and true innovation is rarely inexpensive. A single design can take upwards of a year to develop into a marketable product, and creating new collections according to the relentless schedule of the fashion calendar is like launching a new business several times a year. Design pirates trade on this investment without the attendant risk by harvesting the most successful designs.[28]

The result is a business environment that all too often runs counter to the fundamental principle embodied in *Mazer*, namely, that "sacrificial days devoted to ... creative activities deserve rewards commensurate with the services rendered."[29]

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[28] *See generally* Diane von Furstenberg, *Fashion Deserves Copyright Protection*, L.A. TIMES, Aug. 24, 2007, http://www.latimes.com/opinion/la- oew-furstenberg24aug24-story.html; Laura C. Marshall, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTELL. PROP. L. 305, 311 (2007); see also Bureau of Labor Statistics, U.S. Dep't Of Labor, Occupational Outlook Handbook: Fashion Designers (2014-2015 ed.), available at http://www.bls.gov/ooh/arts-and-design/fashion- designers.htm#tab-3.

[29] *Mazer*, *supra* note 20, at 219.

Contrary to the claims of commentators unfamiliar with the inner workings of the fashion industry, unfettered copying does not promote sustainable innovation. For all that macroeconomic statistics reveal about the industry's overall economic growth, the gross numbers obscure the effect of legal incentives that reward opportunistic imitation at the expense of truly transformative enterprise.[30]

Behind the industry's strategically cultivated glamour and public disregard for copying that behind the scenes is treated as an existential threat, many celebrated and critically recognized designers and fashion houses live in constant fear of collapse, kept afloat by family, friends, loans, and, if they're lucky, the occasional investor convinced that with a bit more cash there is a chance of breaking the cycle. Emerging designers are typically among the less fortunate victims of predatory plagiarism; countless otherwise promising creators soon disappear, giving up fashion entirely or resigning themselves to churning out derivative product as hired hands. This does not even account for the would-be

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[30] *See generally A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 11-12, 79 (2006) (statement of Jeffrey Banks, Fashion Designer, Council of Fashion Designers of America and statement of Professor Susan Scafidi); *Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. on Intellectual Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 7, 9 (2011) (statement of Lazaro Hernandez, Designer & Cofounder, Proenza Schouler).

creators who disappear without ever seeing their labels produced after enduring an experience that many signatories to this brief have heard recounted countless times — being invited to show one's work to a company with the promise of being brought on board as an employee or a vendor, only to discover that the company's sole intention was to steal original designs. Given the human impulse to create there will always be some new designers entering the market, but most will never reach their full potential.

Broader protection for fashion in all its forms is available in much of the world. A growing number of countries have established design rights as a separate category of intellectual property protection, including all of the 28 European Union member states, Japan, India, Pakistan, Singapore, and beyond. France for well over a century has maintained a copyright regime that treats fashion on an equal footing with other artistic works. At the same time, the most successful global fast-fashion chains are based in countries with established protection for fashion designs, indicating that the existence of intellectual property protection for original fashion designs is completely consistent with consumer access at a mass-market price point. The U.S., by contrast, has an incentive structure in which companies and designers with the best long-term chance of sustained success are those that strategically minimize risk by copying others' original work – a result at odds with our typical official stance on the economic importance of intellectual property rights, the inclusion of such

rights in our international trade agreements, and our strong protection for other industries.

D. Conceptual Separability in Copyright, and the Partial Protection It Provides Designers, is Critical to the Fashion Industry

In the broader context of fashion and copyright law, conceptual separability has for decades played a particularly salient strategic role. The established protection that it offers to fabric designs and other two-dimensional patterns has provided textile and fashion designers relatively stable boundaries within which to stake claims to their original works. Now more than ever, with the advent of digital printing technologies that offer cost-effective means for fashion designers to produce custom fabrics even in small amounts, both small independent designers and large fashion houses can avail themselves of this relatively inexpensive and fast legal recognition of aspects of their original work.

Many jewelry and accessories designers, too, have come to rely on the principle of conceptual separability in designing items that transcend the material necessities associated with wearing them. Cases involving necklaces,[31] artistic belt buckles,[32] and even decorative eyewear[33] have all

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[31] *See, e.g., Trifari, Krussman & Fishel, Inc. v. Charel Co.*, 134 F Supp. 551 (S.D.N.Y. 1955).

[32] *See e.g., Kieselstein-Cord, supra* note 27.

[33] *See, e.g., On Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001).

acknowledged the inclusion of three-dimensional wearable art within the subject matter of copyright. Indeed, the existence of protection is so clear to those within the industry that some recent instances of copying have not required legal intervention at all, much less litigation, but have instead resulted in withdrawal of the offending items once allegations of infringement became public.[34]

Onoculii Designs eyewear by On Ka'a Davis.[35]

In light of this history and reliance on clearly understood protection, a new interpretation of the 1976 Copyright Act that undoes decades of

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[34] *See* Britt Aboutaleb, *Chanel Will Not Make its Pamela Love-Like Crystal Cuffs*, ELLE (Mar. 13, 2012), http://www.elle.com/fashion/accessories/news/a8611/chanel-will-not-make-its-pamela-love-like-crystal-cuffs-39289/; Danica Lo, *Hannah Bernhard Says Iris Apfel Ripped Off Her Toucan Pin Design*, RACKED (May 18, 2011), http://www.racked.com/2011/5/18/7764333/hanna-bernhard-says-iris-apfel-ripped-off-her-jewelry-design-for-hsn.

[35] Onoculii Designs eyewear by On Ka'a Davis, successful plaintiff in *On Davis*, *supra* note 34.

precedent built on the statute's integration of *Mazer* and subsequent regulatory language would inflict substantial harm an industry already at a comparative legal disadvantage with regard to copyright protection. Even more problematic, it would be inconsistent with the very design of the Copyright Act.

II. FASHION IS AN INFORMATION-BEARING GOOD INCORPORATING EXPRESSION PROTECTABLE VIA THE CONCEPTUAL SEPARABILITY STANDARD

The various positions taken before the Court in this case express a deeper tension not only with respect to the copyrightability of certain aspects of fashion designs, but also in the perception of copyright itself. One approach sees copyright as a flexible, material-agnostic framework designed to protect all forms of expressive content with narrowly tailored exceptions. A rather different perspective sees the scope of copyright itself in constrictive terms and is thus more inclined to deny protection to entire categories of media or content. We believe that the statutory evolution of U.S. copyright reflects the first approach; the protectability of fashion is best determined by a standard designed to suit all forms of information technology.

A. The Existing Tests of Conceptual Separability Protect Expressive Elements of Fashion Design but Should Be Rationalized as a Standard Rather than an Additional Rule

A core strength of U.S. copyright law – indeed, of the common law itself – is its incorporation of broadly defined standards in tandem with bright-line rules, a system design that results in both consistency and flexibility over time. While the Sixth Circuit's opinion in the present case meticulously catalogues the various tests for conceptual separability that have been applied or suggested in the past, and then applies its own hybrid test, the remarkable thing about the majority of these abstract descriptive formulations is that in practice they yield the same results. We believe that this points not to a critical lacuna in copyright law, but instead indicates why the statutory predicate for conceptual separability is sufficient in itself.

Rather than join other parties and *amici* in offering yet another test, we suggest that the statute may not truly require one. At base, the pertinent definitions in Section 101 of the Copyright Act establish standards, not rules, and in the statute's broader context this appears to be a deliberate construction.

The brief survey of the history of U.S. copyright in *Mazer* highlights the root problem that the 1976 Act set out to solve. As the Court noted, our copyright regime can be seen as an ongoing process of expansion from its initial parameters, as

copyright protection for books, maps, and charts grew to encompass engravings and etchings, musical compositions, dramatic compositions, photographs and negatives, statues, works of fine art, and, in 1909, "all the writings of an author." In keeping with this expansive trend, the Court found that the law reflects a broad, not narrow, understanding of protectable art.

In essence, the Court in *Mazer* approached copyright law as a design problem, in the sense of what we would now call a problem to be addressed by design thinking. The Court identified the systemic issue being addressed through repeated ad hoc changes and applied an adaptive standard capable of resolving the same issue over time. The addition of protected works on material other than flat paper had exposed a fundamental flaw in early copyright design: a failure to see the media forest for the dead trees. From one angle the decision made a certain degree of sense; words on paper presented a clear distinction between what we now call information technology and the information it conveyed. Other means of conveying visual and verbal information were more overtly hybrid in nature, and the proper way to deal with this was initially unclear. Separability, however, provided an accessible and adaptive principle for distinguishing expressive content from generative processes and underlying material.

By the time *Mazer* reached the Court in the early 1950s, decades of rapid advances in information technology had inspired new means of engaging it, and the Court's *Mazer* analysis echoed

the observations of contemporary communications engineers, who had recently pioneered a technological framework for a material-agnostic approach to expressive content. Distinguishing channels of communication from the information they transmit, including aesthetic appearance; recognizing that the channels of communication can shape how information is conveyed; developing strategies from maintaining a clear signal distinct from the noise that distorts it — these are a few of the core insights that had already become part of the cultural landscape, particularly thanks to a rather unlikely bestseller on information theory by Claude Shannon and Warren Weaver.[36]

Within the legal context, the separability language in *Mazer* and its corollary later incorporated into the Copyright Act served as an expansive solution to what had proven to be untenable circumscriptions of copyright's scope. In other words, the standard's openness to a variety of reformulations that effectively lead to the same result is a feature, not a bug. This adaptive strategy is consistent not only with the current statutory language Section 101, but the approach embodied in other areas of the Copyright Act — most notably the statutory standards for fair use.[37] Trying to circumscribe such standards by filling the

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[36] *See generally* Claude E. Shannon & Warren Weaver, THE MATHEMATICAL THEORY OF COMMUNICATION (Univ. of Illinois Press 1949); Scafidi, *Fashion as Information Technology*, 72-73.

[37] *See generally* Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537, 2537 (2009); Matthew Sag, *Predicting Fair Use*, 73 Ohio St. L.J. 47, 51 (2012)..

gaps with idiotropic metrics (*e.g.*, "marketability"[38]) or reducing context-specific analysis to rigorous rules with procedures and prongs ultimately gives rise to unnecessary complication.

B. The Definition of a "Useful Article" under the Copyright Act Includes Exceptions Related to Appearance and Information that Together Establish the Copyrightability of Expressive Elements of Fashion Designs

The standard for assessing the protectability of a useful article is straightforward, and the same principles that apply to any other useful article also apply to a fashion design. The key to avoiding the problems that occur with tests such as those devised by Petitioner and others is to read the elements of the standard in context.

Petitioner and its allies have challenged the copyrightability of a design that serves to identify the wearer or convey beauty, but to deny copyright on the basis of artistic or informational value would be contrary to both the language and the logic of the statute. In context, references to utility in Section 101 of the Copyright Act are bounded; the distinction is not between useful and useless, but between work that is utilitarian in non-copyrightable ways and work that has copyrightable aesthetic or informational utility. The definition of "useful article" expressly establishes

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[38] *See Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 421 (5th Cir. 2005).

the latter distinction in limiting the term's scope to "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." Portraying appearance and conveying information are utilitarian functions, just not the utilitarian functions that fall outside the domain of copyright.

Instead, as the recurring terms "mechanical," "industrial," and "utilitarian" indicate,[39] the key legal concern here is to differentiate copyrightable work for the "useful processes, machines, articles of manufacture, and compositions of matter"[40] that are more appropriately the subject of a utility patent inquiry. Overlap with design patents is not an issue; once again as noted in *Mazer*, design aesthetics are integral to both copyright and design patents, albeit with different standards and scope of protection. If Congress wished to eliminate the overlap, it could – but it has not.

The Varsity designs at issue in this case are a clear example of the work the statutory standard was designed to protect. The graphic design elements can be identified separately from an article of clothing (cheerleader uniform or otherwise) and they are also capable of independently existing in other media as discrete patterns of lines, angles, and curves with no express or implied reference to dress, whatever the design's original intended or actual use. As the Sixth Circuit opinion noted, the designs in this case

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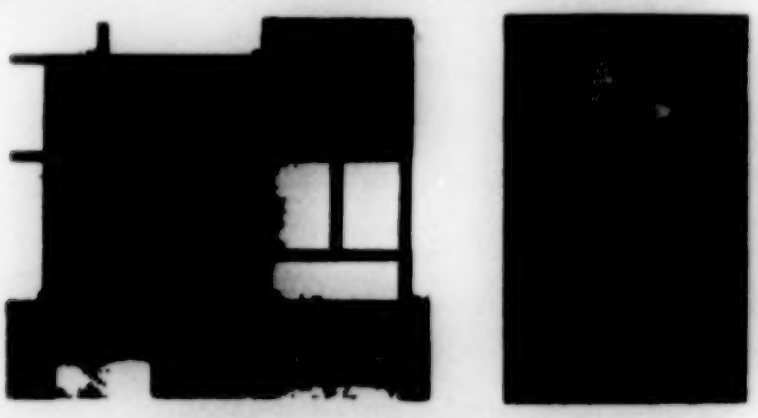
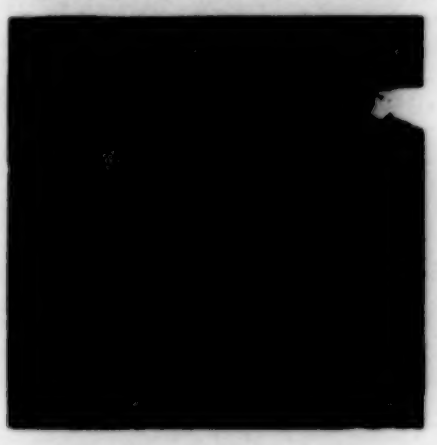
[39] 17 U.S.C. § 101, *et seq.*

[40] 35 U.S.C.A. § 101.

are analogous to the series of copyrightable abstract designs by artist Piet Mondrian that have proven to be capable of replication in a wide array of media, from the original paintings to a dress by Yves Saint Laurent to cheerleader uniforms.



Piet Mondrian (1921)[41] *and Yves Saint Laurent (1965).*[42]



Mondrian-inspired cheerleader costumes (1988).[43]

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[41] Piet Mondrian, Composition with Large Red Plane, Yellow, Black, Gray, and Blue (1921) (oil on canvas).

[42] Yves Saint Laurent, "Mondrian" day dress, The Metropolitan Museum of Art, http://www.metmuseum.org/toah/works-of-art/C.I.69.23 (wool jersey composed of separate color blocks).

[43] "Mondrian" cheerleader apparel designed by Katie Graham in *Toyota -Car Launch*, BRAZEN HUSSY (April 27, 2010).

Whether a dress replicates the design of a painting or a painting reproduces the conceptually separable design elements a dress, the result is the same: the original design is included in the subject matter of copyright.

If, as has been suggested by certain briefs filed in this case, there is a concern that judges do not have the capacity to understand design, it is one that can be addressed in the same manner as with the physical sciences, forensic accounting, linguistics, and any number of other areas where most judges do not have specialized training or knowledge. This case provides an instructive instance, inasmuch as the Sixth Circuit's discussion of the Mondrian dress was adapted from an analogy in the expert report written by one of the current *amici* and subsequently mentioned in Respondents' appellate brief.[44] That said, the assumption that judges lack capacity to identify and to assess the replicability of most designs is highly dubious given the ever-increasing importance of images and visual literacy in contemporary life.

Similarly, the fact that separable designs are capable of having aesthetic or informational utility does not disqualify them from copyright protection – to the contrary, works that embody expressive content are what copyright exists to protect. For

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http://www.brazenhussy.com.au/?p=253 (separate color blocks and strips sewn together using patchwork quilting techniques).

[44] Brief of Plaintiffs-Appellants at 71-72, *Varsity Brands, Inc. v. Star Athletica, L.L.C.*, 799 F.3d 468 (6th Cir. 2015) (citing and quoting expert report of Professor Scafidi).

instance, the expression of individual and collective identity is intrinsically concerned with conveying information, and it has been an integral aspect of creative art from the earliest expressions of symbolic thought.[45]

In protecting the conveyance of information in either verbal or visual form, the Copyright Act is not only material-agnostic but also content-neutral; that is, it does not differentiate on the basis of subject matter or the content of expression. In the case of fashion, the expression is often twofold: first, the designer's original aesthetic statement, and second, information about the eventual wearer, which may include such details as personal taste, mood, group affiliation, socioeconomic level, religious practice, marital status, or type of employment, and which almost inevitably includes at least some indication of body size and shape.[46] Whatever the dubious merits of judging someone by this last bit of information – her apparent figure, as represented through clothing – it is nevertheless part of the information conveyed through the wearing of fashion or costume.

Of course, this information may be accurate or not – in the case of information regarding body shape and size, we might say flattering or not, depending on the idealized body shape of a particular era or culture, whether an hourglass or a gamine absence of curves – but inaccuracy does not erase the copyrightability of information conveyed by fashion design any more than a novel is barred

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[45] Scafidi, *Fashion as Information Technology*, 75-76.

[46] *Id.*, at 79-82.

from copyright protection because the information it conveys is fictional. Cutting-edge designers' experimentation with silhouette, design in the space around the human body rather than on or following the lines of the body itself, is perhaps the most striking reminder that some artistic expression in fashion is closely related to sculpture.[47] No human body is actually the shape of Charles James' famous 1953 "Clover Leaf" gown,[48] Rei Kawakubo's controversial padded and distorted shapes from Spring 1997,[49] or the flying saucer dresses that Jeremy Scott sent down the runway for next spring[50] – and the advent of 3D printing continues to expand the creative possibilities.

Dresses by Charles James, Rei Kawakubo for Comme des Garçons, Jeremy Scott (L to R).

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[47] *See generally* Karen Van Godtsenhoven *et al.*, FASHION GAME CHANGERS: REINVENTING THE 20TH-CENTURY SILHOUETTE (2016).

[48] Charles James, *Clover Leaf* (1953), available at http://www.metmuseum.org/art/collection/search/159347.

[49] Rei Kawakubo for Comme des Garçons, Spring 2017, available at http://collections.lacma.org/node/185545.

[50] Jeremy Scott, Look 54, Spring 2017, available at http://www.vogue.com/fashion-shows/spring-2017-ready-to-wear/jeremy-scott#collection.

The assessment for copyright purposes of other information conveyed through clothing, too, is independent of whether or not it is true in certain limited contexts. A brightly colored article of apparel with a print or design composed of colorblocking and stripes may call to mind a cheerleader, collegiate athletics in general, or a runway look from the current Gucci collection.[51]

Gucci sweater, designed by Alessandro Michele (2016).

As another example, camouflage may against certain backgrounds convey the deliberately misleading information that there is nobody present, though in other contexts it is merely a military-inspired fashion statement. Indeed, all *trompe l'oeil* designs across copyrightable media, including two-dimensional images that incorporate perspective to create the illusion of depth, are analogous to copyrightable fiction – and there is

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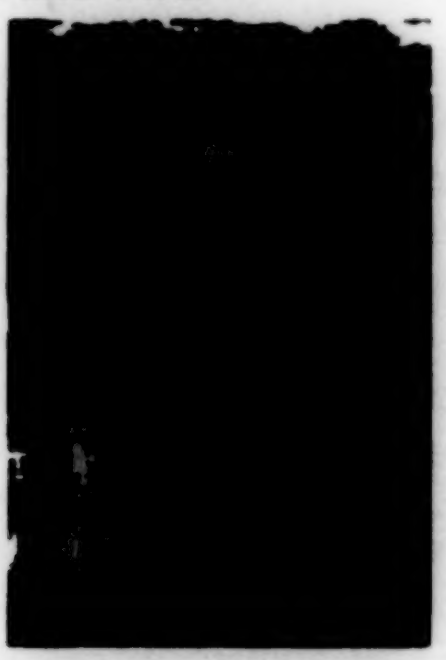
[51]Gucci, Look 14, Fall/Winter 2016, https://www.gucci.com/us/en/lo/runway/women/fall-winter-2016-runway/look-14-p-FW16_FSWLook14US

nothing in the Copyright Act that requires artists who work on such media as walls, ceilings, 3D movies, or dresses to choose either keeping the human imagination in check or being denied legal protection for their work.[52]



Trompe l'oeil dress by Thom Browne, shown on trompe l'oeil tile "swimming pool" runway, Spring 2017.[53]

While copyright protection for the conceptually separable elements of fashion designs does not depend on their artistic value or merit, we note that many museums include fashion items – including

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[52] *Contra* Brief of Professors Christopher Buccafusco and Jeanne Fromer as Amici Curiae Supporting Petitioner, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, No. 15-866 (U.S. Sup. Ct. July 22, 2016); Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71 (2014).

[53] Thom Browne, Look 1, Spring 2017, available at http://www.vogue.com/fashion-shows/spring-2017-ready-to-wear/thom-browne/slideshow/collection#1.

those designed by some *amici* – in their permanent collections and feature them in special exhibitions. These items are no longer worn at all, if they ever were, but are instead presented for the very purpose of displaying their own appearances and conveying information – the aesthetic and informational utility that is so clearly described in the Copyright Act.

C. This Court Should Adopt a Conceptual Separability Standard Not Only Consistent with the 6th Circuit's Result But Also With Long-Established Protection for Certain Elements of Fashion Designs

We believe that the optimal outcome of this case is one that affirms the copyrightability of respondent's designs while providing a more stable framework, grounded in the language of the copyright statute, for assessing separability for useful articles. As written, the standard for separability enables the Copyright Act to extend the same copyright protection for expressive aesthetic or informational content regardless of the material in which it is embodied. Supplementing the standard with an additional test is unnecessary; it has provided a relatively predictable means of assessing copyrightability for designers and judges alike, and the protection it provides should remain.

The Sixth Circuit's opinion reflects the standard's intrinsic utility as well as the difficulty that can result when tests are multiplied beyond necessity. On the one hand, the tests delineated by

the panel reach the same result when applied in this instance and others; Respondents' designs at issue are paradigmatic examples of the identifiable and independently replicable design elements the separability standard has long served to protect. Nonetheless, the characterization of each instance of judicial reasoning as a discrete test typifies the confusion that can result when standards designed to facilitate judicial reasoning are reduced to bright-line rules that inhibit it. The fact that the district court reached a different conclusion in regard to Respondents' designs speaks less to the useful article doctrine than to how disputes involving fashion tend to inspire extra-legal reasoning directed toward keeping fashion unprotected, with little regard for the potential negative consequences for other types of works.

In raising these issues, this case provides the Court with an opportunity to address the problem of applying verbal standards to visual design. For designers and designs of all stripes – fashion, graphic, architectural, and more – the statute has made identifying potentially copyrightable design features intuitively obvious more often than not. Although the separability of a given design may likewise be evident to lawyers and judges in a particular case, explaining why a design is or is not copyrightable requires, at least for now, reducing the information-rich imagery into words. Keeping the standard flexible and open-ended would be an important contribution toward giving judges the space to develop a more sophisticated jurisprudential reasoning in design assessment,

which is likely to be essential as visual literacy becomes a universal requisite.

As expected, this case has attracted a number of briefs admonishing the court that the scope of copyright protection has become too broad, but this is ultimately a question for Congress to decide. This case does, however, provide an apt occasion for addressing a recurring weakness in contemporary fashion and copyright jurisprudence: the counterintuitive reduction of original, creative design elements to mere bodily covering. There is often a striking disconnect between the determination to treat the design of a garment, however original or fanciful, as merely utilitarian for purposes of copyright law versus its aesthetic and identity-expressing significance for designers and consumers. When designers have devised truly original stylistic elements that have no practical function whatsoever beyond conveying appearance or information and are capable of transmedia replication, confidence in the law is only increased when judges feel free to see more creative value than in a screwdriver or wrench.

The fact that the legal interpretation of fashion design in the U.S. can be so radically reductionist reflects in part the persistence of deep-rooted cultural prejudices no longer tolerated in other contexts. The express reference to "ladies' dress" in the House Report is a telling case in point. In the U.S., fashion has for too long been categorized as a feminine, frivolous, and inherently irrational domain, the province of women and gay men. While not the primary aim of this amicus brief or of

Respondents, nor a necessary step in deciding this case, it would be entirely consistent with the deeper logic of separability to scuttle the House Report's exclusion of "ladies' dress" once and for all and reconsider all of the original, separable elements of fashion designs within the context of copyright protection. Putting that aside, what is at issue now is the longstanding copyrightability of conceptually separable designs visible on the surface of articles of clothing, and that, at least, should be affirmed.

CONCLUSION

For the reasons explained herein, *amici* respectfully request that the Court acknowledge the Copyright Act's established protection for the aesthetic and information-bearing designs embodied in otherwise useful articles, including in the context of fashion design, and affirm the result reached by the court of appeals with respect to the copyrightability of Respondents' designs.

Respectfully submitted,

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